IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1922.

FIRST NATIONAL BANK IN ST. LOUIS, *Plaintiff in Error and Petitioner in Certiorari.* vs. STATE OF MISSOURI, UPON INFORMATION OF JESSE W. BARRETT, Attorney-General, *Defendant in Error and Respondent in Certiorari.*	In Error to Supreme Court of Missouri.

APPLICATION FOR LEAVE TO FILE SUGGESTIONS AND BRIEF AS AMICI CURIAE.

SUGGESTIONS, BRIEF AND ARGUMENT.

I.

Application for leave to file suggestions and brief as amici curiae.

Now come Edward J. Brundage, Attorney General of Illinois, Frank E. Healy, Attorney General of Connecticut, George F. Schafer, Attorney General of North Dakota, John H. Dunbar, Attorney General of Washington, Herman L. Ekern, Attorney General of Wisconsin, Ben J. Gibson, Attorney General of Iowa, J. S. Utley, Attorney General of Arkansas, Clifford L. Hilton, Attorney General of Minnesota, Ulysses S. Lesh, Attorney General of Indiana, C. B. Griffith, Attorney General of Kansas,

William Rothmann, of Chicago, a member of the Bar of this Court, and West & Eckhart, of Chicago, Illinois, Special Assistants to the Attorney General of Illinois, and attorneys for United States Bankers Association Opposed To Branch Banking, and make application to the Court for leave to file in the above cause the suggestions, brief and argument annexed hereto, as *amici curiae*.

EDWARD J. BRUNDAGE,
FRANK E. HEALY,
GEORGE F. SCHAFER,
JOHN H. DUNBAR,
HERMAN L. EKERN,
BEN. J. GIBSON,
J. S. UTLEY,
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Burrill Jones

II.

Suggestions.

It may well be assumed, and it is by us assumed, that all questions in which the State of Missouri alone is interested, arising upon this record, will be fully and satisfactorily dealt with by the counsel for defendant in error and respondent in certiorari.

Whatever the decision of this Honorable Court may be herein, it will necessarily affect interests which are of vital concern to the commonwealths and parties represented by these *amici curiae*, and while most, if not all of the particulars in which the decision will so operate concern also the State of Missouri, yet it is believed

that the suggestions and brief herewith presented may aid the Court in obtaining a just conception of the magnitude and extent of the interests involved, and these considerations we hope will constitute justification for this application.

Most, if not all of the states, whose Attorneys General appear on this brief, expressly prohibit state banks from establishing or maintaining branch banks, and in all of them the statutes relating to banking are deemed prohibitive of branch banking. It is obvious that in these states and in all others similarly situated (of which there is a number), the questions in this case to be decided are of very great importance. In a state where branches are prohibited to state banks such banks would obviously be under a tremendous disadvantage if national banks were to be permitted to maintain branches. In fact, it probably would result in the gradual elimination of state institutions from the banking field.

We believe that branch banking is thoroughly undesirable; that from a public standpoint it is objectionable in every respect; and that always and everywhere in the United States it is detrimental to the best interests of the public, and should be done away with. Yet we appreciate that so long as the system shall be permitted by a few states to continue, there should be no discrimination in such states, as between state and national banks, in respect to permission to maintain branches.

We wish to present some suggestions why branch banking should not be permitted to become rooted in any state whose laws do not now permit it, and why it should, so soon as practicable, be prohibited in all states.

It is the consensus of opinion, among those best qualified to judge, that a system which permits branch banking is prejudicial to the best interests of the state or country where it exists. An illustration of this fact

which is commonly cited, are the banking conditions which exist in Canada and the results which it is claimed have grown out of those conditions.

It is an astonishing fact that in Canada today there are but seventeen banks. These seventeen banks maintain nearly 5,000 branches, scattered throughout the various cities and villages of the Dominion. The parent institutions are located, seven in Toronto, five in Montreal and one each in Halifax, Quebec, Weyburn, Hamilton and Winnipeg. None of the other hundreds of cities and villages of Canada has a local bank. All of their banking facilities consist of branch banks.

Each of these branches is managed by an agent or branch manager. It has no other officer and no local board of directors. It receives deposits and forwards the same to the head office, keeping only enough funds on hand for current needs. All applications for loans in excess of nominal amounts must be submitted by the branch manager to the main office for rejection or approval.

There is no local bank west of Winnipeg. In Vancouver, for example, there are forty-eight branches of banks whose headquarters are in eastern cities. In travelling about Vancouver one observes signs of the Bank of Nova Scotia, the Bank of Montreal, the Bank of Toronto and the Bank of Winnipeg, but one looks in vain for the Bank of Vancouver.

That this system has had the effect of retarding the commercial, industrial and agricultural development of Canada and its cities, there cannot be the slightest doubt. At this time the population of Vancouver is approximately 120,000, of Victoria something under 40,000. Seattle, in forty years, has grown from 3,500 to more than 315,000. Portland, in the same period, has grown from 17,000 to 260,000. These four cities have substantially

the same natural advantages. Doubtless there are other reasons for the immensely superior development of Portland and Seattle, but unquestionably one vital factor is that each has a number of strong national and state banks. Each has a corps of real financial leaders interested in and devoted to the progress of their city. It is not conceivable that Portland and Seattle would so far have outstripped the Canadian cities mentioned, if they had been dependent for their banking facilities upon branches of New York, Boston, Philadelphia or Chicago banks, under the management of agents or branch managers. The evils of branch banking may briefly be summarized thus:

(1) *It eliminates the element of local pride and interest which each community takes in its own institutions.*

It requires but slight insight into human nature to realize that the people of any community have a pride in a bank owned by local stockholders, managed by local directors and conducted by local officers, which they could not possibly have in an institution called the "X National Bank of New York" or the "Y National Bank of Chicago," under the management of an agent or branch manager who may or may not be a resident and who probably is subject to removal from time to time and from branch to branch.

(2) *The stimulus and aid which banks under local control give to the building up of local industries is lacking.*

What has been said concerning the relatively greater prosperity of American cities as compared with those of Canada sufficiently illustrates this point.

A community is built up and developed by the making of discreet loans to pioneer enterprises and deserving business men and by financial advice as well as credit. The directors of a local bank are men intimately

related to the business life of their neighborhood. They form their judgments on first hand information. On the other hand, the officers and directors of a large bank in a remote city are interested in their own communities and enterprises. The natural tendency is to invest their funds in their own cities and immediate neighborhoods. They prefer to deal with men whom they personally know, rather than to loan to those about whom they know nothing, except from hearsay.

Applications for loans to a branch bank frequently are refused which should have been made. Local enterprises do not receive the financial credit which they should have. The entire community suffers and the development of the city and surrounding country is retarded. The branch bank in many instances becomes a mere gatherer of deposits which are forwarded to the parent institution.

(3) *The tendency of branch banking is monopolistic and ultimately destructive of the independent bank system.*

Twenty years ago, an eminent banker, speaking in favor of branch banking, argued that it did not mean monopoly and in substantiation of his contention, stated that independent local banks existed and prospered in competition with branch banks in the following Canadian cities and towns: St. Stephen, Prince Edward Island, Frederickton, Yarmouth, Nova Scotia, St. John and elsewhere. Today every one of the banks mentioned by him has passed out of existence. The Canadian year books show a steady decline of the number of banks in Canada until in 1904 there were only thirty-five. At the present time there are only seventeen, a decrease of fifty per cent in nineteen years. In England, as stated in the Encyclopedia Brittanica, there were in 1842, 429 banks,

in 1900, 111, and in 1921, 41, or less than one-tenth the number that were in existence eighty years ago.

The branch bank is a formidable and well-nigh invincible competitor, for the reason, among others, that it is not required to pay capital stock tax at the place where located. Such taxes are paid only by the parent bank at the home office. The local independent bank must pay taxes not only on its tangible property, but also upon its capital stock. Moreover, the local bank must have a certain amount of capital, whereas the branch bank is not required to have any, nor is the parent bank required even to increase its capital. The branch bank, with the help of its mature parent, has the advantage of attacking the small independent bank in its infancy, and in many cases is able to crush it with the monopolistic weapon of competition at a loss.

The proponents of branch banking endeavor to meet these objections with the generalization that all economic conditions in Canada are different from those in the United States. They will in general admit that branch banking, as carried on in Canada, is a bad system and has operated injuriously in the Dominion. But they say the Canadian system is nation-wide and, therefore, of an entirely different character from anything that is proposed in the United States. Here, they say, no one wishes that banks shall be given power to establish branches throughout the nation; all that is desired is the right to establish a few branches in the same town where the parent bank is located. And it is argued that none of the evils incident to the Canadian system would result from branch banking of so restricted a scope.

But probably every system of branch banking began in a similar small way. And those who would like to see such a system in operation in the United States are far

too wise in the first instance to advocate nation-wide branch banking. That would, of course, be highly impolitic. They would naturally say just what they do say, viz., that they do not wish to operate branches outside of their own cities or towns. But if branch banking should once be recognized and established as a legitimate and desirable practice, there can be little doubt that gradually it would be extended beyond the limits of cities and reach into neighboring cities and presently become state-wide and ultimately nation-wide. That such results would follow can hardly admit of doubt. The bank which finds it profitable to maintain branches in its own city would naturally like to increase that profit by establishing as many branches as possible, and ultimately, we would have the Canadian system in all its vicious comprehensiveness.

Many other reasons might be cited why branch banking in the United States under present-day conditions would serve no useful public purpose, and on the other hand, would operate injuriously upon all public interests.

We appreciate, of course, that these considerations are more properly to be addressed to the legislative than the judicial department of our government, yet we deem them not inappropriate here, since it cannot be assumed that the Congress intended to authorize or permit in the national banking system any feature which it believed to be detrimental to the country's welfare. Hence, it may properly be argued that the omission expressly to authorize branch banking is an expression of public policy which should not be contravened by a judicial interpretation which would establish such permission by implication.

Since it is our purpose to endeavor to aid the Court, rather than to add to its labors, we shall confine our-

selves in our brief and argument to observations upon two points:

FIRST—THAT THIS COURT IN THE INSTANT CASE IS WITHOUT JURISDICTION, AND

SECOND—THAT BY THE NATIONAL BANKING LAW, NO AUTHORITY IS GIVEN TO MAINTAIN BRANCH BANKS, AT LEAST IN THOSE STATES WHOSE LAWS DO NOT PERMIT BRANCH BANKING.

III.

Outline of Brief and Argument.

A.

This Honorable Court is without jurisdiction to review the judgment of the Supreme Court of Missouri in this case for the following reasons:

1. *The decision sought to be reviewed rests at least in part on the independent ground of the violation of a statute of the State of Missouri.*

2. *Since the decision rests on the independent ground stated, this Court has no jurisdiction.*

(a) *When the decision of a state court is based upon a federal ground and upon an independent non-federal ground, this Court will not take jurisdiction on writ of error if the non-federal ground is sufficient in itself to sustain the judgment.*

Arkansas Southern R. R. Co. v. *German Bank*, 207 U. S. 270, 275.

DeSaussure v. *Gaillard*, 127 U. S. 216, 232.

Beaupre v. *Noyes*, 138 U. S. 397, 401.

Rutland R. R. v. *Cent. Vt. R. R.*, 159 U. S. 630, 640.

(b) *Even if it be doubtful whether the decision of the state supreme court rested on a federal ground alone, or on a federal and non-federal ground jointly, this Court has no jurisdiction.*

Cuyahoga River Power Co. v. *Northern Realty Co.*, 244 U. S. 300, 304.
Allen v. *Arguimbau*, 198 U. S. 149.
Adams v. *Russell*, 229 U. S. 353.

4. *The doctrine of the case of Illinois Central Railway Company* v. *Messina does not apply to this case.*

(a) *That doctrine applies only when it is doubtful under the state decisions whether the same result would have been reached apart from the decision on the federal question.*

Illinois Central Railway Co. v. *Messina*, 240 U. S. 395.

(b) *It is, of course, obvious that the decision of the Missouri Supreme Court in this case would have been the same if only the Missouri statute had been considered.*

In *Arkansas Southern Railroad Company* v. *German National Bank*, 207 U. S. 270, 275, the Court said:

> "But according to the well settled doctrine of this Court, with regard to cases coming from state Courts, unless a decision upon a Federal question was necessary to the judgment, or in fact, was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate of itself, and which contains no Federal question, the same result must follow as a general rule. Moreover, ordinarily this Court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

And in *Cuyahoga River Power Company* v. *Northern Realty Company,* 244 U. S. 300, the Court, citing with approval earlier decisions, said in part (page 304):

> "But if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and a ground independent of the Federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

So in *DeSaussure* v. *Gaillard,* 127 U. S. 216, 232, the general rule is stated that to give this Court jurisdiction on a writ of error to the state Court it must appear affirmatively not only that a Federal question was presented for decision to the highest Court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

A very clear statement of the rule is found in *Rutland R. R. Co.* v. *Central Vermont R. R. Co.,* 159 U. S. 630, 640, where the Court said:

> "It is well settled, by a long series of decisions of this Court, that where the highest Court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question."

The Supreme Court of Missouri decided (Rec. 14):

> "That it (plaintiff in error) is and has been conducting said branch bank in violation of the laws of the *United States* and of the *State of Missouri;* and that in maintaining said branch bank and conducting the business of the bank throughout, it has usurped and is usurping authority, powers and privileges denied it by the laws of the *United States* and of *this state.*"

In its opinion (Rec. 26), the Supreme Court of Missouri held that "the attempt, therefore, of the respondent to establish a branch bank is not only in excess of its corporate powers but in violation of an express statute." (The statute referred to being Sec. 11737, R. S., Missouri, 1919, in which it is provided that "no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house.")

Thus it appears that the decision of the Missouri Supreme Court was based, at least in part, upon the violation by the bank of the statute of the State of Missouri, which is an independent non-Federal ground and is in and of itself sufficient to sustain the judgment. Under the uniform holdings of this Court, therefore, the writ of error should be dismissed.

B.

The National Banking Act confers no express authority on banks organized thereunder to establish and maintain branch banks nor is such authority conferred by necessary implication.

Section 5190, R. S., reads, "The usual business of each national bank shall be transacted at an office or banking house located in the place specified in its organization certificate."

The learned counsel for plaintiff in error and petitioner in certiorari argue that this section is not a limitation upon the number of offices or banking houses which a national bank may maintain, but rather that it is a command that it must maintain at least one office or banking house. In their brief and argument, page 68, is found the following: "Whoever heard of any corporation on earth being restricted by statute to doing business at one location in a restricted territorial area?"

The implication obviously intended is that no such thing ever was heard of and that it would be utterly absurd.

The answer to this and all similar suggestions is that there is not any more absurdity in restricting a bank to one single banking house than there is in restricting the bank to one single territorial area within which alone it is permitted to do business. Yet the existence of the latter restriction is in no wise questioned.

Suppose that the owner of a racing stable should enter into a contract to sell another "a" horse. Would any one contend that the meaning of the contract is that the owner obligates himself to sell at least one horse and as many more as the other party should decide that he wishes to purchase? Or suppose that a clothing merchant should say "I will sell you 'an' overcoat for $50," would it be for a moment contended that the merchant could be compelled to sell more than one overcoat at that price?

We adopt the suggestion of counsel appearing on pages 68 and 69 of their brief, that the Congress is quite able to choose language clearly expressive of the purposes and intention of the legislation approved by it; hence the conclusion seems to us to be unavoidable that had Congress intended that the business of a national bank may be transacted at more than one office or banking house, it would have said in plain words "the usual business of each national bank shall be transacted at *one or more* offices or banking houses," instead of saying that it shall be transacted at *an* office or banking house. The fact that Congress used the language that it did use, rather than the other expression suggested, is highly persuasive of its intention to limit each national bank to a single office or banking house.

Section 5133, R. S., provides that the organization certificate for a national bank shall state, among other things (R. S., Sec. 5136):

> "*Second.* The place where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, city, town or village."

The argument that the use of the indefinite article "a" or "an" does not denote an intention to limit a bank to a single office or banking house is a two-edged sword. If it has any merit then it may with equal propriety be argued that the requirement of the specification of "the place" wherein a bank's operations shall be carried on does not limit the bank to a single place, but permits it to establish banks in as many "states, territories or districts, counties, cities, towns, or villages," as it may choose. We do not understand that counsel for plaintiff in error contend for any such construction of Sec. 5136, but on the contrary they seem to concede that each bank is limited to one particular county, city, town or village and that one the one specified in its organization certificate.

It is, at any rate, clear beyond the slightest possibility of question, that power to maintain branch banks has not been expressly given. Is such power, as counsel so earnestly contend, among the powers which are necessarily implied or incidental? (Counsel treat the terms "implied" and "incidental" as substantially identical in meaning.)

It is argued (pages 59 and 60 of plaintiff in error's brief) that the legislative purposes in authorizing the creation of national banks "are best accomplished if the facilities for dealing between the bank and the public are increased and not restricted. Plainly, additional banking houses or offices located in the several business

centers usual in all large cities, mean, necessarily, increased opportunity to the business interests located in these several business centers to do their banking business at such additional banking houses or offices; and thereby the public purpose in the legislative mind is better accomplished; and in turn as this means increased custom for the bank, it necessarily follows that the private purpose in the legislative mind (as relates to the bank itself) is also better accomplished."

It is no doubt true that additional banking houses in the same city, town, or village, would bring increased custom to the bank (which, of course, is the primary and very likely the only reason why they are desired by the bank). It is also true that thereby additional banking facilities would be afforded to the general public. It may be conceded that it would be "convenient" and desirable, from the standpoint of the bank, to be permitted to establish branches. It may be conceded that the bank would probably be able to obtain a larger volume of business through the instrumentality of the branches. But to say that branch banks are necessary or essential to the full exercise of the powers expressly granted, is to state what is obviously untrue. A moment's reflection will make this very clear.

The powers given a national bank and the purposes for which it may be organized (so far as they here need be considered) are set forth in Clause 7th of Sec. 5136, R. S., in the following language: "to exercise * * * subject to law, all such incidental powers as shall be *necessary* to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes, according to the provisions of this Title."

Nowhere have counsel for plaintiff in error pointed out how, or in what manner, or in what respect it can possibly be *necessary* for a bank to have branches in order to be able fully and completely to exercise any and all of these powers. It would, of course, be absurd to say that a bank cannot successfully and completely discount and negotiate promissory notes or other evidences of debt without the aid of the instrumentality of branch banks. Equally absurd would it be to say that the lack of branch banks prevents a national bank from completely and successfully and satisfactorily "receiving deposits," or performing any one or more of the other enumerated objects. The most that can be said is that the bank probably will not have opportunity to discount or negotiate *as many* promissory notes; will not have opportunity to receive *as many* deposits or as many opportunities to buy or sell exchange. In other words, the bank will not be able to obtain as large a volume of business if restricted to a single banking house as it would if permitted to establish a banking house in every city block. The argument at most makes out a case for the desirability and expediency of branch banks from the standpoint of the national bank. It makes out no case whatever for the *necessity* of these instrumentalities and it will not do to argue that branches "are or may be 'needful,' 'proper' or convenient'" (brief, page 59) and that, therefore, their maintenance is within the implied or incidental powers of national banks, because this argument loses whatever force it might otherwise have when the express wording of the statute is considered.

The statute gives to the banks, not such incidental or implied powers as may be "proper," "appropriate" or "convenient," but by its express terms limits the incidental powers which may be exercised to such as "shall

be *necessary* to carry on the business of banking." (Clause 7th, Sec. 5136.)

Here again it should be noted that, conceding, as it may be conceded, that the multiplication of branches in a given city or town would mean "increased custom for the bank and incidental increased opportunity to the business interests * * * to do their banking business at such additional banking houses or offices" (brief, page 60), the same argument may be made in favor of permitting a bank to establish branches in other cities, towns or villages, and in other states than that designated in the organization certificate as "the place where its operations of discount and deposit are to be carried on." Yet no one contends, or has ever, so far as we are aware, contended that among the incidental or implied powers of a national bank is the power to carry on "its operations of discount and deposit" in any other city, town or village than that specified in the certificate. It may be that if the branch bank camel should succeed in thrusting under the tent of "implied powers" the nose of home city branches, the effort to force in the whole body of the beast will not be long delayed, although for the time being, activity is perceptible only in the proboscis.

It is very clear that express power to establish branches cannot be found in the statute and it is equally clear that "incidental" power to establish them is likewise not to be found, since the incidental powers recognized by the statute are restricted to such "as shall be *necessary*" and it certainly will not be seriously argued (as indeed it would be futile to argue) that such power is "necessary," since national banks have existed, flourished, prospered, successfully performed their functions, and admirably served the public for nearly sixty years without the aid of branches.

For an admirable and unanswerable analysis of the whole question see opinion of Attorney General Wickersham in Vol. 29 of Opinions of Attorneys General at page 81, *et seq.*

It is interesting in this connection to note that the learned counsel for plaintiff in error evince a lively appreciation of the fact that "branch banks" are objectionable and in the State of Missouri unlawful. The "branch bank" is a cat which the learned counsel have carried as far away from home as possible and are striving mightily to lose. The effort is to convince this Court that the cat does not belong to them or their client.

The information filed by the Attorney General of Missouri specifically charges (Rec. 14) that the respondent did "open a branch bank"; that it is and has been conducting said "branch bank"; that it proposes shortly to open other "branch banks"; and that in opening and conducting said "branch bank" it is violating the law of the United States and of the State of Missouri. Yet in the brief of the counsel for plaintiff in error (p. 2), it is said that the information charges that the bank recently opened a "branch office"; that it intends to establish other "such branches" and that it is without authority of law to maintain "branch offices."

Throughout the brief and argument, the counsel, with meticulous care, strive to draw a distinction between "branch banks" and "branch offices." They wish this Court distinctly to understand that they have never opened any "branch bank" and do not intend to open one. All that they have done is to open a "branch office."

Naturally, the question suggests itself—why this effort to get away from the "branch bank" cat? Obviously it must be and can only be because the counsel recognize and appreciate the illegality of their client's

operating a "branch bank." If they believed that their client possessed the power and the right to operate branch banks, they would, of course, not have been under the necessity of resorting to this rather obvious camouflage—they would have admitted that the institution, the right to operate which is here in question, is a branch *bank*, and as such lawful, and would not have endeavored to hide behind the perfectly transparent disguise of a "branch office."

The learned counsel's attitude in the respect indicated is the most palpable sort of an admission that they recognize the illegality of branch banks in Missouri.

Respectfully submitted,

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POINTS.

LIST OF CASES.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 919.

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in error,
vs.
STATE OF MISSOURI,
upon information, etc.

Brief, as *amicus curiæ*, on the subject of branch banks.

POINTS.

FIRST.

Meaning of the term, "branch banks".

In considering whether a national bank has the power to establish branches in the place where its principal office is located, the sense in which the term is used should be clearly understood. There are various systems of branch banking in different parts of this country and in foreign countries, growing out of the different conditions and processes of development.

In the present memorandum, the term will be held to comprise the right to have several branch offices or places of business in the place designated in the articles of association, where some of the powers of the bank may be exercised for the convenience of the community, as distinguished from the head office, where the business in its entire scope is carried on.

SECOND.

Some of the pertinent legislation on the subject.

The National Bank Act was passed in 1863; but, in its present form, it dates from 1864 (13 Stat., 115). At the time of its enactment, the population of New York City was about 1,000,000, and that of the entire country was about 31,000,000.

By the Act of March 3, 1865 (R. S., Sec. 5155), a state bank with branches might become a national bank and retain its branches.

In 1875, a law was passed imposing a tax of 10% on the notes of state banks (18 Stat., 311); and no state bank has been able to issue any circulating notes since that Act took effect.

The national banks were originally chartered for only twenty years. In 1882, the period was extended for another twenty years (22 Stat., 162); and a further extension of twenty years was authorized in 1902 (32 Stat., 102); and, under existing law, the corporate existence has been extended to ninety-nine years (46 Stat., 767; Act of July 1, 1922, Ch. 257).

Under the Federal Reserve Act of 1913 (38 Stat., 259, Sec. 9), state banks becoming members of the Federal Reserve System retain all their charter and statutory rights.

By Section 25 of the Federal Reserve Act, national banks may be authorized to establish branches in foreign countries and insular possessions of the United States; and, by Section 3, Federal Reserve Banks may establish branches in their respective districts, upon obtaining the approval of the Federal Reserve Board.

By the Act of November 7, 1918, Ch. 209 (40 Stat.,), the consolidation of two or more national banks, with the approval of the Comptroller, was authorized.

THIRD.

State branch banks.

I. Maine, Michigan, New York and Ohio permit branches in cities *where the main office is located.*

II. Branches *throughout the State* are permitted in Arizona, California, Delaware, Georgia, Louisiana, Massachusetts, Mississippi, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia and Wyoming.

III. In the following States, branch banks are now prohibited, but, before the prohibitory legislation was enacted, branches were in many instances established:

Alabama, Arkansas, Florida, Indiana, Maryland, New Jersey, Washington, Wisconsin.

IV. In the remaining States, including Missouri, branch banks are at present prohibited.

From the foregoing summary, it will be seen that in the large financial and commercial centers, such as New York, Boston, Philadelphia, Detroit, San Francisco, etc., state banks are expressly permitted to establish branches.

NOTE. As authority for the above statement, see American Economic Review for December, 1922, p. 730.

FOURTH.

Chaotic and impossible consequence of holding that national banks cannot have branch offices in different parts of the same city.

The National Bank Act applies to the entire country and was, of course, intended to apply uniformly in all parts of the country. But this application cannot be made if it should be held that the Act must be construed with such severe strictness as to limit a bank, in its domestic operations, to one office in a single building.

Under the statutes heretofore referred to (*ante*, p. 2), in those States where a state bank may establish branches, it may become a national bank, with the right of maintaining all branches previously established. Thus, in the same community, there might be a national bank operating branches previously established under the state law, while all banks originally organized under the Federal law would be prevented from competing successfully with nationalized state banks having branches. To place itself on an equality with a nationalized state bank having branches, a national bank originally organized under the National Bank Act would have to go through the contortion of reorganizing under the state law, then establishing branches, and, thereupon, going back into the Federal system. Or, what has in a number of instances been done, it may acquire, by consolidation, one or more nationalized state banks having branches.

It is not reasonable to assume that Congress intended to permit some national banks, by indirect and expensive methods, to establish branches, while

denying that right to other banks that might not be in a position to accomplish the same result, either owing to the impossibility of acquiring the business of a state bank with branches, or owing to the practical difficulties in the way of changing to a state bank, acquiring branches, and then returning to the Federal system.

The business of national banks can be conducted only at a decided disadvantage in those States where state banks have established branches. In New York City, for instance, one state bank (The Corn Exchange Bank) advertises that it has fifty-three branches, through which it can serve the entire metropolitan district, while a much larger national bank, without branches, capable of furnishing even better facilities, would be limited to a restricted territory.

FIFTH.

National banks instrumentalities of Government.

National banks were originally created with the main object of assisting the Federal Government to finance the requirements of the Civil War, by providing a market for the obligations of the Government, which could be used by the banks as security for note issues. It was to prevent any interference with this power of the national banks that the Act of 1875 (*supra*) was passed, imposing a tax of 10% on notes issued by state banks. National banks are fiscal agents of the Government, in any capacity in which they may be found serviceable.

McCulloch *v.* Maryland, 4 Wheat., 316;
Osborn *v.* Bank of U. S., 9 Wheat., 738;
Farmers Nat. Bank *v.* Dearing, 91 U. S., 29;
Davis *v.* Elmira Savings Bank, 161 U. S., 275, 283;
McClellan *v.* Chipman, 164 U. S., 347;
Owensboro Nat. Bank *v.* Owensboro, 173 U. S., 664;
Easton *v.* Iowa, 188 U. S., 220, 238.

The foreign branches of national banks, authorized by the Federal Reserve Act, are expressly described as fiscal agents and are also recognized as instrumentalities for the furtherance of the foreign commerce of the country (Sec. 25).

SIXTH.

The National Bank Act paramount.

I. It is well settled that a State cannot pass an act which may conflict with Federal legislation affecting interstate commerce, or any other subject over which Congress has complete jurisdiction.

Gibbons *v.* Ogden, 9 Wheat., 1;
Brown *v.* Maryland, 12 Wheat., 419;
Minnesota Rate Cases, 230 U. S., 552;
Railroad Commission *v.* Worthington, 225 U. S., 101.

II. The principle is necessarily applicable to state legislation which may tend to give state banks an advantage over national banks.

(See authorities under preceding point.)

This was clearly recognized in Davis *v.* Elmira Savings Bank (*supra*), where this Court said, in an opinion by Mr. Justice White (p. 283):

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows, that an attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the purpose of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court;"

and it was more recently recognized in First Nat. Bank *v.* Union Trust Co. (244 U. S., 416, 425-7).

III. If national banks have no power to have different places for the transaction of their business in a large city like New York, it would follow that state legislation conferring this power upon state banks would be void, as giving them an effective means of building up business at the expense of the national banks. To avoid this conclusion, which would result in inconceivable confusion, inconvenience and loss in all the large cities where branch banks under the state law have been established (Yates *v.* Jones National Bank, 206 U. S., 158, 178), the National Bank Act should be construed to permit the establishment of different places for the transaction of business, unless the Act clearly precludes such construction.

SEVENTH.

The place of business of a national bank.

The express provisions of the National Bank Act on this subject are found in Sections 5134 and 5190 of Revised Statutes, which are, respectively, as follows:

Sec. 5134. The organization certificate shall state, among other things:

> "Second. The place where its operations of discount and deposit are to be carried on, designating the state, territory or district and the particular county and city, town or village."
>
> * * * * *
>
> "Sec. 5190. The usual business of each national banking association shall be transacted at an office or banking house located *in the place* specified in its organization certificate."

By the Act of May 1, 1886, Ch. 73 (24 Stat., 18), a bank may change its name or *the place* where its operations of discount and deposit are to be carried on, to any other place within the same state, not more than thirty miles distant, with the approval of the Comptroller of the Currency.

Full authority is conferred by the Act upon the board of directors, subject to the provisions of the by-laws, to exercise the express and incidental powers granted (R. S., Sec. 5136).

I. In Merchants Bank *v.* State Bank (10 Wall., 604), this Court said (pp. 650-1):

> "The provisions of the Act of Congress as to the place of business of the banks created under it must be construed reasonably."

II. The "place" is the city, town or village where the operations are to be carried on; and the state and county in which the place is located must be designated.

The object of this requirement is to apprise the Comptroller where the association intends to conduct its business, as he has it in his power to prevent a bank from being organized to do business in a particular place, if he thinks that the community is already sufficiently served by existing banks, or for any other good reason (R. S., Secs. 5136, 5169).

III. The requirement that the usual business of each bank shall be transacted at an office or banking house located in the place specified in the organization certificate was intended to insure some visible structural location for the transaction of its usual business. The Congress which passed the National Bank Act must have had a lively recollection of the wild-cat banks that previously flourished, with such disastrous results to a confiding public. Some of these fly-by-night institutions sojourned in sheds (one in Illinois in the shed of a blacksmith shop), and some pitched their tents in vacant lots—a veritable sand-lot aggregation.

The substantial character of a proposed national bank having been assured by these and other requirements, with the approval of the Comptroller, how the business should be conducted, including the location of the office, was left to the board of directors and officers to determine, under such regulations as might be prescribed by the by-laws (R. S., Sec. 5136).

The directors would be remiss in their duty to their stockholders and to the community served by the bank if they did not provide facilities sufficient to enable them to meet the demands upon the bank. The Consolidated Gas Company of New York,

which this Court has recognized as a legitimate monopoly in the City of New York (Willcox *v.* Consolidated Gas Co., 212 U. S., 19, 49), has no express power given to it by statute to establish branch offices; but it would be absolutely impossible for it to take care of its customers over the great territory controlled by it unless it had branch offices throughout the City; and the same is true of any public utility or business corporation. The business corporation laws of the different States, under which such corporations are organized, require the place of operations to be stated in the certificate of incorporation, just as is done in the National Bank Act; but no one has ever questioned the right of a business corporation to have as many different offices or places of business as the directors may see fit to establish.

This is also true of the British Statute of 1862 and its supplemental Acts, under which all business corporations of Great Britain, including the banks, have been organized. Those statutes confer no express authority to establish branch offices, and, like the National Bank Act, they require every corporation to have "a registered office"; but all banks incorporated under the statutes are allowed to establish as many branches and as many agencies as they may find desirable, not merely within the place of the registered office, but in all parts of the country and of the world. The British banking system, through the growth of London as a financial center, has naturally developed into one of branch banking, there being less than half a dozen great banks in London, and these banks have branches everywhere. The right to maintain such branches seems never to have been questioned in the courts, although the English reports have been filled with decisions on all sorts of *ultra vires* questions.

IV. A large business corporation may have its principal office in the downtown district of New York City, near a national bank with which it keeps its principal deposit account. But if that corporation has other offices throughout the City, as is usually the case, where money is received which must be deposited and where payrolls must be met, it would insist on banking accommodations in the immediate neighborhood of these offices, so as to avoid the danger of transporting large amounts of currency over a long distance, through crowded streets, a process attended with serious risk to both life and property. If a national bank has the account of such a corporation, the only way in which it can meet the requirements of its depositor is by having places of business throughout the City.

V. It could never have been intended that a national bank should transact *all* of its business within the walls of a single building, because that would frequently be an impossibility. Checks drawn on other banks are received for collection. These checks must either be presented separately to those banks for payment, or they must be presented at some common place agreed upon, as, for instance, a clearing house. The right to collect and pay checks through a clearing house has never been questioned; because, in large cities, it would be impracticable to transact this branch of the business in any other manner.

Drafts and notes are sent to a bank for collection in all parts of the world; and presentation must be made where they are payable.

A bank may buy and sell coin and bullion; but, in doing so, it must take or make deliveries at whatever place may be required by the terms of the contract.

The certification of a check for an amount larger than the sum standing to the credit of the depositor is expressly forbidden (R. S., Sec. 5208). The act of certification is one, therefore, which must be done with the greatest care, and, ordinarily, only after reference to the depositor's ledger and the ascertainment of the amount standing to the credit of the depositor at the time; and yet this Court has held that a cashier of a national bank may certify a check elsewhere than at the office of the bank.

> Merchants Bank *v.* State Bank, 10 Wall., 604.

In that case, in considering the objection raised to the manner of certification, the Court said (pp. 650-1):

> "It is objected that the checks were not certified by the cashier at his banking house. The provision of the Act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person or by correspondents *or other agents* * * * There is no force in this objection."

And in Bruner *v.* Citizens Bank of Shelbyville (134 Ky., 283), the Court said:

> "A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it."

VI. That a bank may have such offices or places for the transaction of its business as may be reasonably required, in the absence of any express au-

thority conferred upon it by statute, has been repeatedly recognized by this and other courts.

Bank of Augusta *v.* Earle, 13 Peters, 517;
Tombigbee R. Co. *v.* Kneeland, 4 How., 15;
City Bank of Columbus *v.* Beech, Fed. Cas., 2736;
Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.), 370;
Lathrop *v.* Commercial Bank of Scioto, 38 Ky., 114;
Pawcetts, Assignee, *v.* Mitchell, 133 Ky., 361, 365;
Frazier *v.* Wilcox, 4 Robb (La.), 517, 538;
William *v.* Creswell, 51 Miss., 817, 823;
Bank of Kentucky *v.* Schuylkill Bank, 1 Parsons (Pa.), 180, 227.

In Bank of Augusta *v.* Earle, the principal office of the Bank was located in Augusta, Georgia, but an agency was maintained in Mobile, Alabama, for the purpose of dealing in exchange. A bill of exchange in favor of Earle, a resident of Mobile, was accepted by the drawee and discounted at the Mobile agency of the Bank with funds placed there for that purpose. Earle sought to defend the suit on the ground that the Bank had no authority to enter into the contract outside the State of its incorporation.

In the course of the opinion, this Court said (p. 587):

> "The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange, and consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given, clothed the corporation with the right to make con-

tracts out of the state, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another state; and the general power to purchase bills, without any restriction as to place, by its fair and natural import authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; *and also to employ suitable agents for that purpose.* The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter, and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction."

The principle recognized in Bank of Augusta *v.* Earle is directly applicable to national banks, with the limitation that the domestic agencies permitted to them shall be located in the place of the principal office.

EIGHTH.

Future growth and expansion contemplated.

I. There is no limit to the amount of capital which a national bank may have (Act May 1, 1886; 24 Stat., 18). It must not have less than $100,000, in cities with a population in excess of 50,000 (R. S., Sec. 5138).

The National Bank Act, as amended, contemplates the indefinite continuance of the life of a bank, and also the power to increase its capital as the demands of the community upon it grow. In a country which had reached a state of equilibrium and stagnation, there might be some ground for construing such a statute as the National Bank Act as limiting the right of a bank to one particular building; but no member of a legislative body in this country could at any time in its history have entertained the slightest doubt that, decade by decade, the country would steadily and progressively grow and develop in its industries and population. As early as 1774, Edmund Burke was so deeply impressed by the amazing strides in the material development of the country, that, in his speech on "American Taxation", he was led to exclaim that, "nothing in the history of mankind is like their progress".

All of our great cities show constant shifts in the localities where different lines of business have been carried on. The business of many of the national banks in these cities has been developed in connection with particular industries and patrons in their immediate neighborhood. But in the City of New York, complete lines of business have moved

from one part of the city to another, and the residential sections have yielded to the encroachments of business. Owing to these constant migrations and changes, a bank will see its business slipping away from it if it is helpless to accommodate its customers by establishing facilities to meet their requirements in their changes of location; and state banks with the right to establish branches wherever they please will be able to do this business at the expense of the shackled national banks.

II. A public utility cannot occupy the streets of a municipality unless it can show that it has acquired a special franchise enabling it to do so. Such franchises are, therefore, closely scrutinized and will not be extended by implication. But where a franchise is granted covering territory included within the limits of a particular municipality, and where subsequently the municipality has been enlarged by the annexation of adjacent territory, the franchise of the utility will extend to this territory and the utility will be under obligation to supply the persons resident in such territory.

People *ex rel.* Woodhaven Gas Light Co. *v.* Deehan, 153 N. Y., 528, 533;

St. Louis Gas Light Co. *v.* St. Louis, 46 Mo., 121;

Grand Rapids *v.* Hydraulic Co., 66 Mich., 606, 612;

Illinois Cent. R. Co. *v.* Chicago, 176 U. S., 646, 666;

Russell *v.* Sebastian, 233 U. S., 195, 209.

The question involved is somewhat analogous to that once raised as to whether the Federal Constitution applied only to States in existence at the time of its adoption.

Town of Pawlet *v.* Clark, 9 Cranch, 292.

A national bank is not a strict public utility, though, in requiring it to obtain the approval of the Comptroller before it can undertake any business and in placing it under the supervision of the Comptroller afterwards, it is evident that there is a public interest involved, laying a certain obligation on the bank to meet the requirements of its customers in different parts of the community.

III. Where a bank has started with a small capital and has grown into a great institution, with a largely increased capital, it is inevitable that its original banking quarters will be outgrown. The plot on which its building stood may not be sufficient to provide it with the space required and it may not be able to purchase additional adjacent plottage; can it be successfully contended that it could not, under such conditions, acquire additional space in the neighborhood where some of its business could be conducted? If that is so, is there any specified area to which the bank is limited?

Under the power conferred by the Act of 1918, to accept individual trusts, is there any good reason why a national bank in the City of New York, in the Wall Street district, should not be permitted to have an office in the uptown residential district, where much of such business would naturally originate?

The power to retain a deposit might depend upon the power to supply the depositor with a safe deposit box for his securities in the vicinity of his residence; but a national bank in the Wall Street district would inevitably lose such a customer, unless it could maintain a local office for such purpose.

IV. A national bank cannot lend to any one person or corporation more than 10% of its capital and surplus (R. S., Sec. 5200).

The great railroad and industrial corporations of the country are constantly obliged to borrow large sums for their temporary purposes. Only banks with a large aggregate capital and surplus can meet the heavy demands of such corporations; and with the expansion of business and the growth in the size of business corporations, the banks must keep pace with this development, through the increase of capital or by means of consolidations with each other; but this cannot be done where the bank is limited to a single office in a large city, as the business would not justify it. The National Bank Act was not merely for yesterday or for today, but for the future; and if it has not sufficient flexibility to adapt itself to the constantly varying conditions of widely different communities, it will inevitably be superseded by the more pliant state laws.

NINTH.

Impossibility of affirmative legislation.

The suggestion naturally occurs, that if Congress intended that national banks should have the right to maintain a number of branch offices in a city, for the more convenient transaction of the various kinds of business arising in different localities, it would be a simple matter to have the Act amended by expressly conferring this power upon the banks. The conditions, however, are such that there is no hope of obtaining an amendment of this kind.

As to the fifteen sparsely populated States where branch banking is prohibited, the representatives in Congress of those States would never vote to allow a power to be exercised by national banks which was denied to their state banks.

As to the seventeen States where there is no express provision on the subject applicable to state banks, and where the state banks have not attempted to establish branches, it is equally certain that the representatives of those States would not favor an amendment of the National Bank Act which might give the national banks a distinct advantage over the state banks.

As to the large industrial States in which the great bulk of the banking business is done, where branches are permitted by state law, the state banks are so well satisfied with the advantage which they now possess, that they would never willingly permit their representatives in Congress to deprive them of it.

TENTH.

Alleged legislative anl executive construction.

In reaching the conclusion that national banks do not have the power to maintain more than one office for the transaction of their business, the Court below relied upon three Acts of Congress, upon assumed opinions of the Department of Justice, and upon the supposed practical construction placed upon the Act by the Treasury Department (Record, pp. 12-13).

I. The first Act of Congress referred to was the Act of March 3, 1865 (R. S., Sec. 5155), which provided that a state bank having branches might, upon becoming a national bank, retain its branches.

The Court below argued that this would have been unnecessary if Congress had been of the opinion that a national bank had the right to establish branches. But it should be borne in mind that, at that time, the country was still in the throes of the Civil War, that the National Bank Act had been passed to assist in financing the war and that Congress was, therefore, desirous of extending the national bank system by offering inducements to state banks to come into that system. The National Bank Act had been in force for such a short time that there had been no occasion to consider the question of whether it permitted the establishment of branches; and it was undoubtedly for the purpose of assuring the state banks that they would not be deprived of any powers by joining the national system that this express provision allowing them to retain their branches was made.

The Act of 1865, instead of being a legislative construction to the effect that banks organized under the National Bank Act had no power to establish branches, is obviously a construction to the exact contrary; because, it is not reasonable to suppose that Congress intended to establish a system of national banks with unequal powers, leading to unequal competition and to the resulting confusion which this Court pointed out in Yates *v.* Jones National Bank (206 U. S., 158, 178); and it is not conceivable that Congress would have made this express provision in favor of state banks if it had not been of the opinion that the right had been given to banks organized under the Federal law.

II. The other two Acts referred to by the Court below were those which permitted the establishment of branches at the Chicago and St. Louis Expositions. These Acts cannot be held to constitute any recognition on the part of Congress, that a national bank had no power to establish additional offices or agencies in the natural growth and expansion of its business.

Both Expositions were necessarily held in places remote from the ordinary business activities of the cities, where, in ordinary times, there would have been no business whatever for a bank to do; and, in the case of St. Louis, a portion of the grounds lay outside the city limits. The business, in each instance, was a special one, of limited duration, where it was desirable to make temporary arrangements for the convenience of the public; and it was only a reasonable precaution for the Commission to obtain express authority to that end.

III. *Construction by the executive officials.*

1. The subject of branch banking has only in recent years become a practical one. The great advantage enjoyed in the large commercial centers by state banks having branches, over national banks, as well as the advantage of some of the larger national banks, with branches obtained through consolidations, have, for the first time, made the question one of practical interest. For fifty years probably, there was no occasion for the Department to decide the question; and there is no evidence whatever of any practice, long continued or otherwise, on the part of the Comptroller, to confine national banks to a single building. It is obvious, indeed, that the question was never seriously considered, to the extent of providing a rule of action, until the opinion of Assistant Attorney General Fowler (approved by Attorney General Wickersham) in 1911 (29 Opinions Attys. Gen., 81).

Even in that opinion, however, in which there is an exhaustive review of the authorities, it is repeatedly recognized that a national bank may lawfully act in particular matters through agents outside of the main banking house, and may establish agencies for the transaction of different branches of the business, as distinguished from branches for transacting a general banking business. This conclusion was thus expressed in the opinion (pp. 86, 87):

> "Those authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange or possibly to some other particular class of business incident to the banking business.
>
> * * * * *

> "These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business."

Taken as a whole, the reasoning of the opinion points to the broader conclusion reached by Mr. Wrisley Brown, then special assistant to the Attorney General, recognizing the right of national banks to establish branches, in the widest sense of the term.

The Court below made the statement (Record, p. 13), that "the Attorneys General of the United States have *uniformly* construed the National Bank Act as not authorizing the establishment of branch banks". No citations are given by the Court for this sweeping statement; but no opinion on the subject, other than the one above referred to, has been found.

2. So far as there has been any practical construction of the Act by Government officials in recent years, it has been in recognition of the right to establish branch offices. This was made clear by the present Comptroller of the Currency, in a letter published in the 1922 Supplement to Pratt's Digest (p. 7):

> "I am not authorizing the establishment of branch banks, but have been permitting banks, in states where state banks and trust companies have offices, agencies or branch banks, to establish additional offices in some of the large cities where it is necessary to meet the competition of state banks that have literally taken possession of cities with branch banks

> or offices; and these facts are notorious and are well known to all state bankers of the country."

In the District of Columbia, three branch offices or places of business have recently been established by the Riggs National Bank, undoubtedly with the approval of the Comptroller of the Currency and equally without doubt to the satisfaction and convenience of the residents of the District, including possibly some of the members of this Court.

The records of the Comptroller's office show that the national banks in the country have established to date eighty-nine branch offices; and within the past few days, the Comptroller has given permission to the Chase National Bank of New York to open twelve additional offices in the City of New York.

ELEVENTH.

Possible impairment of national bank system.

To hold that the National Bank Act does not permit a bank in a large city to open offices in different parts of the city for the more complete and effective transaction of its business, would be to drive many national banks into the state system; and in all the large and growing commercial centers, it would inevitably result in the supremacy of the state banks and the ultimate undermining of the national bank system.

New York, April 30, 1923.

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